83-161

NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

JIMMY LEWIS JOHNSON,

Petitioner,

vs.

STATE OF ARKANSAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS

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QUESTION PRESENTED

1. Is the Arkansas Statute (Ark. Stat. Ann. Section 41-1604) defining felonious aggravated assault void for vagueness in violation of the due process clause of the Fourteenth Amendment to the United States Constitution because it permits conviction of the felony offense when an actual misdemeanor battery has occurred in violation of *Ark. Stat. Ann.* Section 41-1603 (battery in third degree)?

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OPINION BELOW

The opinion of the Arkansas Court of Appeals is not reported. (It was not designated for publication in accordance with Revised Supreme Court Rule 2). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The final order of the Arkansas Court of Appeals was entered June 1, 1983, affirming the judgment of the Washington County Circuit Court sentencing Petitioner to six years in the Department of Corrections and a fine of $5,000.00 on the offense of aggravated assault. Notice of filing for Writ of Certiorari to review was filed in the

Arkansas Court of Appeals on June 15, 1983. A motion to state the mandate to the Arkansas Court of Appeals and to remain on bond was filed in the Arkansas Court of Appeals on June 15, 1983. On June 29, 1983, the Arkansas Court of Appeals entered an order granting Petitioner's motion to stay the mandate and to remain on bond.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

The United States Constitutional Provision involved is Amendment 14 and can be found in U.S.C.A., Constitution, Amendment 14, page 223.

Amendment 14 provides as follows:

> * * * No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On April 19, 1982, Petitioner was charged by information with the offense of aggravated assault (violation of *Ark. Stat. Ann.* Section 41-1604) in that on that same day he did knowingly, feloniously, and under circumstances manifesting extreme indifference to the value of human life, he purposely engaged in conduct that created a sub-

stantial danger of death or serious physical [injury] to Cyrus Johnson. (Petitioner's 9 month old son).

On April 20, 1982, the Petitioner appeared, was arraigned, entered a plea of not guilty and the case was set for jury trial.

On June 9, 1982, a jury trial was held. The principal witness against the petitioner was his wife, Priscilla Johnson, who had given previous statements to the sheriff and in Juvenile Court proceedings. She refused to testify, was cited for contempt and sentenced to sixty days in jail. Finally, in response to leading questions of the Prosecuting Attorney and a nodding of the head, she testified to substantially the facts related in the opinion of the Court of Appeals.

At the close of the testimony, the trial court instructed the jury on the offenses of aggravated assault, assault in the first degree, assault in the second degree, and battery in the third degree.

The jury found the petitioner guilty of aggravated assault and fixed his punishment at six years (maximum penalty) in the Arkansas Department of Corrections and a fine of $5,000.00 on June 10, 1982. Judgment was entered in accordance with the verdict of the jury and the trial court sentenced petitioner to a term of six years in the Department of Corrections and to pay a fine of $5,000.00.

On June 28, 1982, Petitioner filed a Motion for New Trial and alleged some six grounds as reasons he should be granted a new trial. Among them was that the verdict was not supported by the law because the testimony adduced at trial described conduct which constituted battery in that assaults and batteries were not interchangeable under the

Arkansas Criminal Code; rather the Code preserves distinctions under prior law as regarded assaults and batteries.

On July 22, 1982, a hearing was held on the motion for new trial and the trial court entered an order overruling the motion for new trial.

Petitioner appealed the judgment of conviction and the order overruling his motion for a new trial to the Arkansas Court of Appeals. He argued six points for reversal among which he alleged it was error to charge and convict him of aggravated assault (felony) when the assault was consummated and resulted in a battery (misdemeanor).

On June 1, 1983, the Arkansas Court of Appeals delivered its Opinion and decision affirming the judgment of the Washington County Circuit Court. It held that it was permissible to convict on a charge of aggravated assault (felony) even when the conduct resulted in a battery (physical injury).

On June 15, 1983, the petitioner filed a Notice of Appeal, Notice of Filing for Writ of Certiorari to Review, and a Motion to Stay Mandate. On June 29, 1983, the Court stayed its mandate to permit this Petition.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Court of Appeals.

ARGUMENT

Petitioner believes that this question is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of this question.

This question brings into play the void-for-vagueness doctrine, and petitioner relies upon the rule that the legislature must set reasonably clear guidelines for law enforcement officials and triers of fact, to prevent arbitrary and discriminatory law enforcement (*Smith v. Goguen*, 415 U.S. 566 (1974)), and upon the companion principle that a vague law impermissibly delegates basic policy matters to policemen, prosecutors, judges, juries for resolution on an *ad hoc* and subjective basis, with attendant dangers of arbitrary and discriminatory application (*Grayned v. City of Rockford*, 408 U.S. 104 (1972)). Thus, it is insisted that the Arkansas Statutes are, therefore, void for vagueness, because the prosecuting attorney or the trier of fact may arbitrarily decide whether an accused is to be charged with or convicted of felonious aggravated assault punishable by imprisonment in the Department of Corrections or third degree battery, a misdemeanor, punishable by up to one year in the County Jail and a fine of $1,000.00. See also *Roberts v. Louisiana*, 428 U.S. 325 (1976).

The dangers inherent in giving the police, prosecutor, judges or juries the unfettered discretion discussed above is replete in this case. The sheriff and prosecutor could not charge felonious battery in the first degree (Ark. Stat. Ann. Section 41-1601) or second degree (Ark. Stat. Ann. Section 41-1602) because they could not prove the serious physical injury element of the offenses. They did not charge battery in the third degree, a misdemeanor (Ark. Stat. Ann. Section 41-1603) which this offense actually was, because they

wanted to send the petitioner to prison. They could not charge him with attempted felonious battery (Ark. Stat. Ann. Section 41-701) which would have resulted in a felony conviction (Ark. Stat. Ann. Section 41-703) because it was not an attempt, it was an actual battery. So, they charged and convicted him of felonious aggravated assault (Ark. Stat. Ann. Section 41-1604), even though an actual touching or battery occurred, in order that they could convince an uncontrolled jury to send petitioner to prison for misdemeanor battery instead of to jail or a fine.

There is an evil in these statutes that due process should correct. A battery is when an actual touching or physical injury results from the conduct. It would be a misdemeanor herein because in this case the injury done does not meet the definition of serious physical injury of the felonies. It is not felonious aggravated assault because a touching or physical injury has resulted. The petitioner has been charged and convicted of something he did not do. He did not assault the victim, he battered him. See the comment following *Ark. Stat. Ann.* Section 41-1601 wherein the commentators say: "Under the Code, conduct is denominated as 'battery' or 'assault' depending on whether or not physical injury results." See also the comments following *Ark. Stat. Ann.* Section 41-1604. The evil here that should be corrected is that under a due process construction of Arkansas law and the facts of this case, the petitioner should have been convicted of a misdemeanor and not a felony.

In view of the above, petitioner submits that the Arkansas Court of Appeals violated his Fourteenth Amendment rights to due process of law because the statutes in question are void for vagueness and permit the

authorities to run wild in charging and convicting persons in this type of situation.

Thus, this case involves an important and substantial issue. The Arkansas Court refuses to apply these well known due process principles. This Court should accept and look at this case and determine if this important Fourteenth Amendment doctrine was violated herein and in similar cases. It is important that this case be accepted for decision because an important Federal question of violation of Fourteenth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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APPENDIX "A"

ARKANSAS COURT OF APPEALS

No. CA CR 83-3

JIMMY LEWIS JOHNSON ..... *Appellant*

VS.

STATE OF ARKANSAS ..... *Appellee*

Opinion Delivered June 1, 1983

APPEAL FROM WASHINGTON COUNTY
CIRCUIT COURT

MAHLON GIBSON, *Judge*

AFFIRMED

GEORGE K. CRACRAFT, *Judge*

Jimmy Lewis Johnson appeals from his conviction of aggravated assault for which he was sentenced to a term of imprisonment of 6 years and a fine of $5,000. The charge grew out of an incident in which his nine month old son was physically abused and beaten. He advances several points of error which we will address separately. We find no merit in them.

The evidence most favorable to the State reflects that appellant and his wife, Priscilla Johnson, have two children. The youngest, Cyrus, was nine months old at the time of the incident. Priscilla Johnson, a most reluctant witness, testified that at about 3:00 a.m. Cyrus woke up crying and would not go back to sleep. This so infuriated the appellant that he struck the child "off and on for a three hour period"

during which he also attempted to smother him by placing his hand over the child's mouth and nose.

At the time the appellant was arrested there was evidence that the child was badly bruised about the buttocks, stomach, back and head. Some of the bruises were red and others were blue or purple. Photographs introduced into the record graphically indicate that the child had been badly battered. There was testimony that some of the bruises were of very recent origin. The police officers who introduced the photographs stated that the bruises were much more apparent when they first saw the child than they appeared in the pictures. A deputy sheriff, after informing appellant of his Miranda rights, took his written statement in which he admitted that "I have hit my kid too hard, and I'm ashamed of it." Although he denied hitting Cyrus that morning he admitted putting his hand over his mouth to keep him from screaming. He admitted to having caused most, but not all, of the bruises they found on the child. He admitted that he often hit the children too hard and did not realize sometimes how hard he had hit them. There was no medical evidence regarding the degree of Cyrus' actual injuries, internal or external.

First, the appellant contends that since an actual battery was proved it was error to charge and convict the appellant of aggravated assualt. He argues that the consummation of a battery prohibits the trial on the charge of assault. We do not agree. In many jurisdictions battery has ceased to exist as a separate offense, its elements having been assimilated into assault provision. In the adoption of our Arkansas Criminal Code the legislature concluded that assaults and batteries were worthy of treatment as separate offenses having distinct criminal sanctions and the con-

ceptual distinction between assaults and batteries drawn by former law was preserved. This is made clear by the commentary to Ark. Stat. Ann. §41-1601 (Repl. 1977).

This does not mean, however, that where only a misdemeanor battery results from a felonious assault the latter charge may not be maintained. While under our Code conduct is denominated as "battery" or "assault" depending on whether or not physical injury results, it does not follow that aggravated assault cannot be charged where a battery results. To the extent applicable here Ark. Stat. Ann. §§41-1601 — 41-1063 (Repl. 1977) define "battery" as the infliction of "physical injury." The degrees of battery are graded according to the seriousness of the actual injury.

Our battery statutes are intended to place sanctions upon the actual infliction of injuries, whereas our assault provisions are intended to place sanctions upon creation of substantial risk of injury. Ark. Stat. Ann. §§41-1604 — 41-1606 (Repl. 1977) define various degrees of assault. In particular Ark. Stat. Ann. §41-1604 (Repl. 1977) defines aggravated assault as follows:

> A person commits aggravated assault if, under circumstances manifesting extreme indifference to the value of human life, he purposely engages in conduct that creates a substantial danger of death or serious physical injury to another person.

Ark. Stat. Ann. §41-115(19) (Repl. 1977) defines serious physical injury as follows:

> Physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss

> or protracted impairment of the function of any bodily member or organ.

The provisions regarding assault do not deal with actual injury but with "conduct" of the actor which *creates substantial risk that injuries will result* and the degrees of assault are graded according to the seriousness of the injury *likely to result from the risk created.* Therefore, where an assault does result in a battery, the nature of the crime of assault is not to be measured by the result accomplished but by the degree of risk of harm which has been created by the purposeful or reckless conduct of the actor. This means that where one creates a substantial risk of death or serious physical harm but, due to fortuitous circumstances less serious harm results, his culpability does not have to be measured only by the result.

While the conduct of the appellant constituted both a felonious assault and a misdemeanor battery, the appellant cites us no cases which would require the State to pursue only the lesser charge and we have found none. Nor do we find any defect in the statutes. Our courts have consistently held that the mere overlapping of statutory provisions does not render them unconstitutional. There is no impermissible uncertainty in the definitions of these offenses. *Cromwell v. State*, 269 Ark. 104, 598 S.W.2d 733 (1980); *Wilson v. State*, 271 Ark. 682, 611 S.W.2d 739 (1981). In *Warren v. State*, 272 Ark. 231, 613 S.W.2d 97 (1981), in dealing with an overlapping of a misdemeanor assault statute and one declaring terroristic threatening to be a felony, the court held that the State was not required to pursue the lesser offense. We find no error.

The appellant next contends that the verdict is not supported by substantial evidence to sustain the finding

that the conduct of the defendant created a substantial risk of death or serious physical injury to Cyrus Johnson. We find no merit to this contention based on three well settled rules of review in determining whether the evidence is sufficient to sustain a finding of guilt. We view the evidence in the light most favorable to the State. The jury's finding of guilt may be upheld if there is any substantial evidence to support it, and it is the function of the jury and not the appellate court to weigh evidence or judge credibility of witnesses. *Warren v. State, supra.*

Here there was evidence that a nine month old infant was so severely beaten that almost his entire body was bruised. There was evidence that the appellant placed his hand over the child's mouth and nose and smothered him. The jury could easily infer that the appellant, manifesting an extreme indifference to the value of the child's life, purposely engaged in a course of conduct that created a substantial danger of death or physical injury to the child. Considering the age of the infant, the extent of the bruises upon his body, the evidence of the continual beating over a three hour period and attempts to smother him, we cannot say that there was not substantial evidence to support those findings.

When called to the stand as a witness for the State appellant's wife Priscilla expressed reluctance to testify against her husband. After the court instructed her on several occasions that she should answer the questions put to her, she invoked the protection of the Fifth Amendment. The prosecuting attorney immediately moved that she be granted immunity and the trial court granted it. Even with grant of immunity her reluctance to testify continued to such an extent that the trial judge was required to explain

to her several times the effect of the grant of immunity and the consequences that might flow from a refusal to answer questions. She finally announced her intention to answer no more questions because she did not desire to get her husband in trouble. When further admonition appeared to be of no avail, the trial judge sentenced her to 60 days in the county jail for contempt of court. In a conference with the trial judge and counsel during a recess Ms. Johnson relented and agreed to testify further. The trial court vacated the sentence and thereafter she reluctantly answered most questions put to her.

Although no objection was made at the time either event occurred and no cautionary action on the part of the trial court was requested, appellant now maintains that, although the trial court had power to grant immunity and to punish this witness for contempt, it was error for the court to do so in the presence of the jury. As no objection was made to the action of the court at the time, that issue may not be argued for the first time on appeal. *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). Furthermore, it is clear that at the time immunity was granted nothing was disclosed that the jury should not have heard. It is also clear that this was a most reluctant witness and that the trial judge was more than patient and sympathetic with her. Appellant has not pointed out to us, and we have been unable to find, any prejudice that might have resulted from the statements or actions of the trial judge which he was forced to take.

On the morning the crime was committed Priscilla Johnson had gone to the home of her neighbor, Lamar Pettus, seeking his aid in getting the children out of the house and away from harm. Mr. Pettus is a practicing

attorney and before he was called as a witness, appellant pointed out that Mr. Pettus had represented him in some collection claims and he invoked the attorney-client privilege. The prosecuting attorney announced that he had intended to ask Mr. Pettus no questions concerning communications between him and the appellant. The court declared that Mr. Pettus might testify, but not with regard to any privileged communication. The appellant contends that it was error for the court to allow his testimony but points out no testimony relating to matters which were privileged communications. Mr. Pettus merely related that when he talked with the appellant in his residence the appellant told him to go back and tell Priscilla to come home and if she wanted to she could take the children and leave without any interference. We find no merit to this contention and no prejudice that might have resulted from the witness's testimony.

After the State had rested the appellant testified in his own behalf. During the course of cross-examination of the appellant the prosecuting attorney asked him the following questions:

Q. Do you know the agency SCAN Mr. Johnson?

A. Yes.

DEFENSE COUNSEL: Again I would request that counsel restrict his questions within the scope of direct examination.

PROSECUTING ATTORNEY: Well this fits in with direct.

THE COURT: Go ahead.

Q. Are you aware of the agency SCAN?

A. Yes.

Q. Have you ever been reported to SCAN for beating your children?

A. I don't know. I think I have once before.

Appellant contends that this evidence was prejudicial to him since it put before the jury an impression that he was a chronic child abuser "because SCAN is an acronym for SUSPECTED CHILD ABUSE NEGLECT." This argument might be more persuasive had the appellant objected to the question or raised this issue before the trial judge. The only objection made was that the initial question was "not within the scope of proper cross-examination." We conclude that such an objection is not broad enough to preserve for our review the objection the appellant now makes and that it cannot be raised here for the first time. *Wicks v. State*, *supra*.

Appellant finally contends that the trial court erred in permitting Pettus to testify about statements made by Priscilla Johnson at the time she came to his house for help. When defense counsel objected, the State's attorney said that he was not offering the evidence of that conversation to prove the truth of the matter asserted but only to show that the statements were offered as an explanation of why Pettus went to the Johnson residence on that occasion. The court overruled the objection in the following language:

> THE COURT: I overrule. I think it comes within a hearsay exception, something not offered to prove the truth of the matter asserted. Go ahead.

We find no error in that ruling as it is well settled that a hearsay statement is not objectionable when offered merely to prove that a statement was made and not the truth of the matter asserted.

In subsequent testimony Pettus did testify with regard to statements made to him by Priscilla Johnson. However, neither an objection nor motion for mistrial or that the jury be instructed to disregard the statements was requested at the time the hearsay statements were repeated. In the absence of proper objection made in the trial court we will not consider the issue on appeal. *Wicks v. State, supra.*

We find no error.

APPENDIX "B"

IN THE ARKANSAS COURT OF APPEALS

JIMMY LEWIS JOHNSON ..... *Appellant*

vs. No. CA CR 83-3

STATE OF ARKANSAS ..... *Appellee*

NOTICE OF FILING FOR WRIT OF CERTIORARI TO REVIEW

Filed June 15, 1983

Comes the Appellant, Jimmy Lewis Johnson, and hereby gives notice of filing for Writ of Certiorari to review the final decision and opinion delivered on June 1, 1983, by the Arkansas Court of Appeals affirming the Judgment of the Washington County Circuit Court, dated June 9, 1982, and designates the entire Judgment, Opinion and Decision of the Arkansas Court of Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provisions of 28 U.S.C. §1257(3).

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